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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1386

ADAM CLAYTON POWELL, JR., *et al.*,
Plaintiffs-Petitioners,

— against —

JOHN W. McCORMACK, *et al.*,
Defendants-Respondents.

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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May 24, 1967

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

Introduction

The petition seeks review, before judgment in the Court of Appeals, of the District Court's dismissal of an action against the House of Representatives and its Members. The complaint presents for the first time in our history a suit by a Member-elect against the House, challenging its action in excluding or expelling him. No matter how diplomatically petitioners cast their plea, they seek nothing less than a direct confrontation between the Court and the House—an order that the House of Representatives rescind its exclusion of Mr. Powell and vote to seat him—with all the profound implications such a confrontation entails.* As petitioners' counsel candidly admitted in oral argument in

* Among other things, the complaint seeks an order restraining the named defendant Members of the House and all other Members of the House of Representatives of the 90th Congress "from taking any action to enforce House Resolution No. 278 *or any other action* which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated" (R. 61, complaint 13; emphasis added)—*i.e.*, an order forbidding the Members of the House from voting, or directing them to vote, in a particular way on matters relating to the seating of Mr. Powell.

the District Court "here we are suing the legislative branch" (Transcript of April 4, 1967 (before the District Court) 204).*

Respondents therefore agree that the petition presents important issues and that they deserve thorough, careful and expeditious consideration. However, as the 170-page petition itself demonstrates, the case is not ripe for consideration by the Court through the extraordinary procedure petitioners seek. The petition under Rule 20 should be denied.

The need for care in considering these constitutional issues is obvious. All speed consistent with that needed care is also desirable. No less than petitioners, the House of Representatives is deeply concerned with the vitality of representative democracy and the constitutional principles that nourish it. The rapid progress of this action since its commencement barely two months ago amply demonstrates respondents' cooperation in achieving a prompt resolution. The case can and should continue to be expedited, but it should also be handled with the care it so plainly requires.

The nature of the issues presented in the complaint, the additional issues sought to be raised in the petition, and the record of this proceeding to date all show the need for prompt but full consideration by the Court of Appeals before any review by this Court. Expedited recourse to regular appellate review will permit the novel issues and arguments in this case to be sharpened, and will give the political process involved a fuller opportunity to function. Such a course is consistent with the procedure adopted in *Bond* v. *Floyd*, 385 U.S. 116. Particularly in a case of this nature, the Court "should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 77.

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* Cited hereinafter as "Tr." Contrary to the statements in the petition (*e.g.*, Pet. 126), no transcript of the Court of Appeals argument is in the record.

Statement

During the fall of 1966, the Committee on House Administration conducted an inquiry into alleged misuses of congressional funds and privileges by Congressman Adam Clayton Powell (*see* H.R. REP. No. 2349, 89th Cong., 2d Sess. (1967)). When the 90th Congress first assembled on January 10, 1967, Mr. Van Deerlin of California rose in the House to ask that Mr. Powell step aside during the administration of the oath. In accordance with precedent, Mr. Powell did so. After a debate, in which Mr. Powell participated, the House adopted House Resolution 1, 113 CONG. REC. H16 (daily ed. Jan. 10, 1967). That Resolution authorized a select committee to make an investigation and to report to the House regarding "the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York . . . as well as his final right to a seat therein . . . ."

The Select Committee held hearings on February 8, 14, and 16. On February 23, 1967, it filed a report with the Clerk of the House (H.R. REP. No. 27, 90th Cong., 1st Sess. (1967)). The Report found that Mr. Powell had ignored the processes and authority of the New York courts, had wrongfully and willfully misused congressional funds, and had been contemptuous in refusing to cooperate with committees of the House. The Report recommended seating, censure and a fine, the seating to be contingent on Mr. Powell's acceptance of the other conditions.

On March 1, 1967, after extended debate, the House by more than a two-thirds vote (307 to 116) adopted House Resolution 278. 113 Cong. Rec. H1957 (daily ed. Mar. 1, 1967). That Resolution adopted the Committee's findings, but rejected its recommendations and instead excluded Mr. Powell from the House.*

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* For examples of other Members-elect excluded on similar grounds see, *e.g.*, B. F. Whittemore (excluded from House of Repre-

One week later, on March 8, Mr. Powell and thirteen other persons describing themselves as qualified electors of the 18th Congressional District of New York filed the complaint in this action against the Speaker of the House and five other Members, individually and as representatives of the class of the entire House membership, and certain officers and employees of the House. The suit sought a declaration that House Resolution 278 was unconstitutional and various forms of injunctive and mandatory relief against the Members of the House and its agents (R. 61).* Petitioners moved for a three-judge court and a preliminary injunction requiring Mr. Powell to be seated forthwith. Respondents opposed those motions and also moved to dismiss for lack of jurisdiction and for failure to state a claim. Oral argument on all the motions was held on April 4. On April 7, the District Court entered its order dismissing the complaint for lack of jurisdiction because the complaint presented a political question (R. 95; Pet. A-2).

On the same day, petitioners filed a notice of appeal and docketed the record in the Court of Appeals. On April 10, they filed a 56-page motion for summary reversal, prin-

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sentatives, 41st Cong., 2d Sess. (1870) for selling appointments to the military and naval academies) (LEGISLATIVE REFERENCE SERVICE, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES RELATING TO EXCLUSION, EXPULSION AND CENSURE (Defendants' Exhibit No. 1 in the District Court) 48, 163-64 (1967)); William Lorimer (excluded from Senate, 62d Cong., 2d Sess. (1912) for election improprieties) (SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, SENATE COMMITTEE ON RULES AND ADMINISTRATION, SENATE ELECTION, EXPULSION AND CENSURE CASES, S. Doc. No. 71, 87th Cong., 2d Sess. 100 (1962); William S. Vare (excluded from Senate, 71st Cong., 1st Sess. (1929) for election irregularities) (*id.* at 119); Frank L. Smith (excluded from Senate, 70th Cong., 2d Sess. (1928) for unreasonable campaign expenditures) (*id.* at 122).

* References to "R." are to the certified record filed in this Court. References to "Pet." are to the petition for certiorari.

cipally based on arguments not pressed in the District Court, and for other relief, and requested an immediate hearing (R. 1-56). On April 10, the Court of Appeals denied an immediate hearing and permitted respondents to file a responsive pleading within the usual five-day period (R. 96). Respondents answered on April 14 (R. 97) and petitioners replied on April 19 (R. 114). Petitioners' motion for summary reversal was then extensively argued on the next available motion day, April 27. The same afternoon, the Court of Appeals entered an order denying it. The order also dispensed with printing and certain other formalities, and directed counsel promptly to confer with the clerk of that court to establish an expedited briefing schedule, as respondents had offered, so that the case could be fully but promptly briefed and argued on the first available day after the briefs were filed (R. 126; Pet. A-14).

Rather than accept the expeditious consideration accorded by that order, petitioners, on May 4, filed a motion to stay its provisions, stating they intended to file a petition for certiorari as promptly as possible (R. 128). Respondents filed a memorandum opposing the stay motion on May 9 (R. 131). On May 10, the Court of Appeals entered an order re-establishing the regular briefing schedule (R. 136; Pet. A-16). That order extends the time for petitioners' brief, which otherwise would have been due on May 17, until June 19, or two weeks after any denial of a petition for certiorari, whichever is later.

Meanwhile, on April 11, 1967, four days after dismissal of the complaint, Mr. Powell was re-elected in a special election. On May 1, 1967, the House received a certificate from the New York Secretary of State certifying to the election of Mr. Powell (113 CONG. REC. H4869 (daily ed. May 1, 1967)). However, Mr. Powell has not to date appeared at the House to request that he be given the oath of office.

Argument

I

If the 170-page petition proves nothing else, it proves the need for further refining and developing of the issues by review in the Court of Appeals.

The petition presents ten questions for consideration by this Court. The first seven questions squarely raise major constitutional issues which have never before been resolved, and in our view cannot be resolved, by any court. Questions 8 and 9 raise issues which we believe have previously and recently been resolved against petitioners by this Court. The petition also injects a host of new factual allegations and arguments neither presented, responded to, nor resolved in any way below. Prominent among the new factual issues is the charge, not made in the complaint or in either court below, that Mr. Powell's exclusion was racially motivated (Pet. 99-105). In our motion to dismiss in the District Court, we emphasized that "the complaint does not set forth any facts whatsoever suggesting in the slightest particular that Mr. Powell was excluded because of considerations of race . . . ." (Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss 6). We continued to emphasize that fact in oral argument, both in the District Court and in the Court of Appeals (Tr. 81-84). Petitioners have never previously claimed the contrary. They have never sought to amend the complaint to include such an allegation and they have never before suggested in any argument or paper that the exclusion of Mr. Powell was motivated by racial prejudice.

Petitioners should not be allowed to raise such a contention for the first time at this stage of the proceeding.*

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* As stated in House Resolution 278, the exclusion of Mr. Powell was based on the findings of the Select Committee, recited in the Resolution, that he: (1) "repeatedly ignored the processes and authority of the courts in the State of New York . . .;" (2) "im-

At the very least, petitioners' allegations raise serious and difficult factual issues that have not been pleaded, that are strongly disputed, and that no court below has had an opportunity to consider. Accordingly, they are not ripe for consideration here. *Cf. Dombrowski* v. *Eastland*, U.S. , No. 118 (May 17, 1967; Slip Opinion 2); *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330, 344.

Since filing their complaint, petitioners have tacked back and forth over a host of constitutional issues. In the District Court, petitioners sketched out a brief 19-page opposition to defendants' motion to dismiss which did not even mention many of the contentions pressed here. In the Court of Appeals, petitioners substantially shifted ground and devoted two-thirds of their 57-page motion for summary reversal to a contention that Mr. Powell had not been accorded substantive or procedural due process by the House, issues not mentioned in the brief in the District Court. In their 170-page petition to this Court, they now raise numerous additional points. Obviously, the petition calls upon this Court to resolve for the first time most of

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properly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) . . .;" (3) "Permitted and participated in improper expenditures of government funds for private purposes;" and (4) "was contemptuous" in refusing to cooperate with committees of the House "in their lawful inquiries." Petitioners have not challenged those findings at any time in the course of this litigation and they do not deny them in the petition.

An inquiry into the belated charge that the exclusion of Mr. Powell was racially motivated would require this Court to disregard these undenied reasons for the action of the House and to probe into the motivations that led each Member to vote as he did. It is not lightly to be assumed that solemn action of the House, taken by over two-thirds of its membership, rested upon any grounds other than those recited in the Resolution or reflected in the debate. This Court has emphasized that the integrity of the judicial and the administrative process precludes probing "the mental processes" by which judges and administrators decide matters. *United States* v. *Morgan*, 313 U.S. 409, 422. Surely, the same considerations are equally applicable to Members of the Congress and the reasons for their votes. *Cf. Fletcher* v. *Peck*, 6 Cranch 87.

the unique issues raised. Needless to say, our response, both to the new and the old contentions made in the petition, would be quite extensive, and we would require a period of time comparable to the time taken by petitioners to prepare and present adequately our position to the Court.

Moreover, the petition does not even deal with the most important jurisdictional problems involved in this case. Petitioners mention the speech or debate clause, article I, section 6, clause 1, only in one footnote (Pet. 127, n.100). A main ground of our motion to dismiss was that this clause, as construed in *Kilbourn* v. *Thompson,* 103 U.S. 168, and *United States* v. *Johnson,* 383 U.S. 169, expressly forbids a court to hear a case against the Members of the House and its agents for action taken within the House. The petition does not discuss or even cite *Kilbourn,* and its only reference to *Johnson* appears in a footnote quotation taken for other purposes from the report of the Select Committee (Pet. 121 n.97).

This Court's decision last week in *Dombrowski* v. *Eastland* once again reaffirms the legislative immunity which has its roots in the speech or debate clause and which underscores the separation of powers between the legislative and judicial branches of our federal government.* Petitioners also fail to discuss seriously the basic problem raised by the political question doctrine enunciated by this Court in *Baker* v. *Carr,*

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* As we read *Kilbourn* and *Dombrowski,* they would seem to be dispositive, and we will so urge. According to *Dombrowski, Kilbourn* teaches that a judgment "could not be entered against the defendant members of the House," even when their action within the House may be unconstitutional, as it was held to be there (Slip Opinion 3n.). *Dombrowski* reaffirms that the same immunity, although less absolute, applies to officers or employees of the legislative branch (such as those respondents in this case who are not members of the House), at least in the absence of evidence of their "involvement in any activity that could result in liability" (Slip Opinion 3). There is no allegation in this case that the respondent non-member officials and employees have engaged or threatened to engage in any activity outside the House that would bring them within the scope of *Dombrowski's* ruling as to Mr. Sourwine.

369 U.S. 186; they cite and argue from cases involving state action invalidated under the supremacy clause, instead of true political question cases involving coordinate branches of the federal government.*

Finally, petitioners overstate their argument as to the substantive issue that we believe no court can ever reach in a suit against the House and its Members—whether the House in excluding Mr. Powell correctly interpreted its own constitutional power under article I, sections 2 and 5. Should the Court of Appeals or this Court reach that issue, four centuries of British and American political history must be studied with care. As we read the historical record, it convincingly demonstrates that the House correctly interpreted its constitutional power in excluding Mr. Powell and that, in any case, the substantive constitutional question is one for the House alone to judge as the tribunal of first and last resort.** For a balanced treatment of the subject, we refer the Court to Chapter 6 of Professor Chafee's *The History*

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* *Compare Alejandrino* v. *Quezon*, 271 U.S. 528, which was a suit by a suspended member of the Philippine Senate against the members of that Senate seeking to require them to rescind the resolution of suspension. On review of the judgment of the Supreme Court of the Philippines, which had dismissed the suit as not within its jurisdiction, this Court held, through Mr. Chief Justice Taft:

> "We do not think that we can consider this question, for the reason that the period of suspension fixed in the resolution has expired, and, so far as we are advised, Alejandrino is now exercising his functions as a member of the Senate. It is therefore in this Court a moot question whether lawfully he could be suspended in the way in which he was. Equally so is the still more important question whether the Supreme Court of the Philippines had any jurisdiction by extraordinary writ of mandamus or injunction to require the Senate—a part of the Island Legislature, and a separate branch of the Government—to rescind its resolution and to re-admit Alejandrino to the Senate as an active member." (271 U.S. at 532-33)

** *See, e.g., Bradlaugh* v. *Gossett*, 12 Q.B.D. 271 (1884), holding the Court of Queens Bench without jurisdiction to entertain an action by an excluded Member of Commons to enjoin the Sergeant at Arms from carrying out the resolution by which he was excluded, without inquiring into the lawfulness of the resolution.

of Free Speech in the United States (1941), and especially to pages 252 through 257 thereof. Professor Chafee concludes:

> "[W]e are not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect. A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute, and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness." *Id.* at 257.

Petitioners have developed only a part of that "common law" and its antecedents in England, the colonies and the early state governments; the very substantial evidence contrary to petitioners' position has been omitted or glossed over.*

For all the above reasons, this case is not yet in proper focus for consideration by this Court. Intermediate consideration by the Court of Appeals would help to narrow and refine the issues, and, together with this Court's very recent treatment of the threshold jurisdictional issue in *Dombrowski,* may even make it unnecessary for this Court to speak further.

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* We believe that petitioners' review of the history is confused because it deals largely with an issue not presented by this case—the power of a legislature to create standing disqualifications, such as the lack of sufficient property, applicable to all prospective members. This confusion leads petitioners to ignore, for example, many precedents excluding or expelling particular members and members-elect for particular misdeeds committed before, during or after election. (*See* footnote, p. 3, *supra.*) We expect to demonstrate that the framers intended in article I to distinguish between standing disqualifications and particular cases of unfitness.

II

Petitioners' present plea for de novo emergency resolution in this Court of the many newly presented issues and arguments must be weighed against the conduct of petitioners since the April 7 decision of the District Court and their unwillingness to accept the expedition afforded by the Court of Appeals. As we have said, the action was commenced on March 8 and at plaintiffs' urgent request promptly heard and decided by the District Court on April 7, so that the result could be known in advance of the special election scheduled for April 11. The appeal was docketed on April 7. If petitioners had any case for certiorari before judgment, that was the time to apply for it. But instead, petitioners chose to pursue an unusual motion for summary reversal based primarily upon nonjurisdictional issues not pressed in the District Court.

The expedited consideration given this case by the Court of Appeals (see pp. 4-5, *supra*) shows beyond doubt that that court has recognized the "importance of the time element" and other considerations in this litigation and is prepared to act promptly. *Cf. United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175; *Aaron* v. *Cooper*, 357 U.S. 566, 567. The Court of Appeals is already well into the case. It has held an extensive oral argument, it has issued three orders and it has stated its willingness to approve an expedited briefing schedule and to hear the case promptly thereafter. Respondents have made clear their willingness to join in an expedited briefing schedule. If petitioners would pursue their Court of Appeals remedy, the Court of Appeals could doubtless announce its judgment and opinion during the summer, and a normal petition for certiorari could be ripe for consideration when this Court begins its fall term.* With this pro-

* Indeed there might be by now a Court of Appeals decision if petitioners had pursued their appeal and taken advantage of the willingness of that court and respondents to expedite briefing and argument, instead of pressing their motion for summary reversal.

ceeding in its present confused and undeveloped state, this Court should not be deprived of the valuable assistance of a decision by the Court of Appeals.

The deliberate course followed by this Court in refusing to advance the recent Georgia exclusion case, *Bond* v. *Floyd*, 385 U.S. 116, would seem most appropriate here. That case involved first amendment rights, alleged to be infringed by a state legislature, and advancement was urged to avoid "chilling" those rights. Prior to the unsupportable claims raised in the petition that the House acted on grounds of race, no such issue or claim was involved here. Also, the *Bond* case involved questions of federal judicial power under the supremacy clause to invalidate state action, while this case involves the different and more difficult question of the rights and powers of coordinate branches of the federal government.

The arguments for accelerated disposition of the two cases are roughly similar. Thus, following Bond's exclusion from the Georgia House, he was re-elected on February 23, 1966, as Mr. Powell has been here. On March 16, 1966, Bond filed a jurisdictional statement, together with a motion to advance the case for argument to the week of May 2, 1966. Jurisdictional Statement and Motion to Advance, No. 87, October Term 1966, filed March 16, 1966. The grounds asserted for advancement were that the action of the Georgia House would chill freedom of expression by those running in the forthcoming November 1966 election, that there was irreparable injury by reason of Bond's continued exclusion, and that the case would be mooted when Bond's term expired on December 31, 1966.* *Ibid.;* Appellants' Reply Brief Upon Motion to Advance [typewritten], filed March 24, 1966. On May 23, 1966, after Bond was again excluded, he filed a memorandum pointing out that fact and urging that the motion be granted. *Ibid.;*

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* The term for which Mr. Powell was elected on April 11, 1967, will not expire until January 1969.

Appellants' Memorandum, filed June 15, 1966. Nevertheless this Court, on June 20, 1966, denied the motion to advance while noting probable jurisdiction, 384 U.S. 997. Bond was thereafter re-elected in the November 1966 election, the appeal was argued on November 10 and decided on December 5, 1966.

There is no reason to depart from the deliberate course followed in *Bond* and every reason to adhere to it here because of the different and more serious questions this case poses.

Nor is the procedure followed in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, at all applicable here. In *Youngstown* review was sought of action taken by the executive branch to insure steel production throughout the United States during the period of national emergency involving the Korean conflict. When the district court granted the injunction sought by the steel companies, production was halted by a strike. The Government immediately appealed to the court of appeals and applied for a stay of the injunction, stating that a stay was necessary to the national defense and that the Government intended "to file within 6 days a petition to the Supreme Court of the United States for a writ of certiorari . . ." (Record 442-43). On the same day, the court of appeals en banc granted the stay on condition that the petition be filed within two days thereafter (*id.* at 444). Thus, with the Government asserting a grave national emergency "imperiling our national defense" and stating its intention to seek review in this Court before judgment in the court of appeals, the court of appeals itself decided to step aside so that this Court could give prompt consideration to the matter. In view of the action taken by the court of appeals, counsel for the steel companies also filed a cross petition for certiorari along with that of the Government.

Here, however, there is no such grave national emergency. The Court of Appeals has not affirmatively stepped

aside, but has indicated its willingness to hear and decide the case promptly. We believe that, in a matter of this undigested complexity, this Court should utilize the normal process of refinement and elucidation by the Court of Appeals.

III

Petitioners' final argument is that the Court should telescope normal procedures because only it can restore representation to the 18th District. Representation for the district is, of course, of high importance. For the very purpose of providing that representation, a special election was held on April 11. Mr. Powell ran again and was elected. However, Mr. Powell has chosen not to present himself to take the oath and thus to give the House an opportunity to decide whether he should now be seated.

As petitioners know, the Speaker carefully reserved to the House the right to make a new determination if Mr. Powell was again elected. In response to a parliamentary inquiry by Mr. Celler to the Chair, the following occurred:

> "MR. CELLER. In so far as the resolution of the gentleman from Missouri refers to the duration of the 90th Congress, if the Member-elect were to run again in the 18th District of New York and be elected, would the fact of the wording of the resolution preclude him from taking his seat?
>
> "The SPEAKER. That is a matter which the Chair cannot pass upon at the present time. That is a matter which, if it arises, would require consideration in the future by the House." 113 CONG. REC. H1942 (daily ed. Mar. 1, 1967).

Again on May 1 the Speaker made that position clear when he announced that the Clerk of the House had received Mr. Powell's certificate of election in the special election held on April 11, 1967. He entertained a parliamentary inquiry and responded thereto:

"MR. LENNON. Mr. Speaker, I have read with a great deal of interest, as I am sure other Members have, the record of the colloquy that took place between you, Mr. Speaker, and the gentleman from Iowa [Mr. GROSS] and our distinguished majority leader and I would like to read this concluding statement of the distinguished Speaker:

" 'I can say to the gentleman that from the leadership's angle my present impression is that the next move is up to Mr. POWELL.'

"Mr. Speaker, my parliamentary inquiry is, Will the House of Representatives have to take affirmative action in view of the resolution that was passed by the House on March 1 of this year with regard to the possible admission to this body of the gentleman from New York [Mr. POWELL]?

"The SPEAKER. When the Member appears, if he is challenged, it will be a matter for the House to decide and for the House to express its will." 113 CONG. REC. H4869 (daily ed. May 1, 1967).

Mr. Powell thus has it in his power to test the matter by presenting himself for admission. What will happen in that event, we cannot know and neither can the Court. Under the Speaker's ruling, it will be for the House to decide. And, of course, it is possible that no court will have to decide this case. *See Alejandrino* v. *Quezon*, 271 U.S. 528.*

There have been various speculations and predictions reported in the press as to how the House may act. Until the event occurs, the fateful constitutional questions peti-

* Under such circumstances, this Court should adhere to the established principle of its jurisdiction that it will not "anticipate a question of constitutional law in advance of the necessity of deciding it" (*Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (Brandeis, J., concurring)), or "entertain constitutional questions in advance of the strictest necessity", *Parker* v. *County of Los Angeles*, 338 U.S. 327, 333. Time and again this Court has abided by this principle and has declined premature review. *See, e.g., Poe* v. *Ullman*, 367 U.S. 497; *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237; *United Public Workers* v. *Mitchell*, 330 U.S. 75. The present case calls for the same sound discretion.

tioners press in this case should not be rushed along without regard to the possibility that further evolution of the political process may have a significant bearing on those issues.*

In oral argument in the Court of Appeals, Judge Leventhal pressed the issue of why, if immediate representation for the 18th District was the issue, Mr. Powell did not appear to request his seat. Petitioners' counsel replied that the reason why Mr. Powell does not appear is because his electorate is entitled to have him seated with his full seniority. A court order invalidating the original exclusion, they erroneously contended, would entitle him to the full measure and range of influence of accrued seniority.

Whatever influence and authority flows from seniority is of course a matter the Members of the House and the party caucuses must determine for themselves. Although respect for seniority is conventional, it is not required by the rules of the House and certainly not commanded in any sense by the Constitution or by any law. Seniority has been taken away from other members, *e.g.*, the recent case of Representative John Bell Williams of Mississippi (CONGRESSIONAL QUARTERLY, Jan. 6, 1967, at 25). Whatever may be the reasons for Mr. Powell's failure to appear as a Member-elect and for his preference for a court-ordered seating and the confrontation which that would provoke, that preference should not have any weight in the balance which this Court must strike in determining whether to grant petitioners' extraordinary writ for certiorari prior to judgment in the Court of Appeals.

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* We argued to the District Court and would develop further the thesis that the question whether Mr. Powell should be seated is one which is in the first and the last instance reserved to the House to decide, subject to review only by the people through the political process of election and the force of public opinion. Such a thesis is not at war with the vitality of representative government. The courts are not the only guardians of our liberties. Members of the Congress are also sworn to uphold the Constitution. As Professor Chafee has cogently pointed out, "[I]f the House of Representatives should exclude a man on some whimsical ground, no appeal would lie from its action. Neither is there any appeal from the Supreme Court." CHAFEE, *supra*, at 253.

CONCLUSION

For the reasons stated, the petition for writ of certiorari prior to judgment should be denied.

May 24, 1967

Respectfully submitted,

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